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Nos. 85-463 and 85-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MEYERS INDUSTRIES, INC.,
Petitioner,

v.

KENNETH P. PRILL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

I. PETITIONER HAS NO STANDING TO SEEK CERTIORARI OR MOVE TO INTERVENE IN THESE CASES.

Petitioner Meyers Industries seeks certiorari in a case where it is not a party to the proceeding below. Rule 19 of the Supreme Court's rules is quite clear that only parties to a proceeding in a court of appeals may seek certiorari to that court for claimed errors. Meyers is at this stage an interloper and its petitions should both

be denied. Similarly, its motion to intervene should be denied.

II. THE COURT BELOW ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONER'S UNTIMELY MOTION TO INTERVENE.

The proceeding in the court below began on February 21, 1984, when Respondent Prill filed his petition for review in the court of appeals. FRAP Rule 15(d) requires that Meyers, were it interested in the proceeding, should have intervened within 30 days of that date. Meyers declined to do so. Instead, it waited until 2½ months after the court of appeals' decision on the merits on February 26, 1985, to move to intervene. The court unanimously denied the motion, and then unanimously denied a petition for rehearing, a suggestion for rehearing en banc, and a motion to grant post-judgment intervention nunc pro tunc.

Rules are rules, and Prill is entitled to the benefit of them. Meyers offers unverified and purportedly equitable reasons why the 30-day time limit should have been waived: (i) its own financial difficulties, and (ii) its belief that the NLRB would adequately represent its interests in this case. The short answer to both of these is that Meyers could have intervened timely and then filed a letter brief endorsing the brief of the NLRB. It would then have the standing it seeks today.

Meyers' petition to the Supreme Court is entirely different from an appeal from a lower tribunal to a court of appeals. Thus, Meyers' arguments concerning "protecting its interests" in the Supreme Court evaporate. A party in litigation gets only two bites of the apple: trial and appeal. The law Meyers cites might be convincing if it concerned Meyers' untimely intervention in a district court so it would have access to a court of appeals. But a party has no "interest" to protect after a court of appeals decision. The Supreme Court takes cases which interest it, not us. There is no right to certiorari.

Finally, the national interest in this matter is adequately protected by the Solicitor General, who has in this case decided not to proceed in the Supreme Court. Prill agrees with that decision, and so evidently did the court of appeals. This decision was entirely within its discretion. Meyers' petition in No. 85-464 should be denied.

III. THE ISSUE PETITIONER SEEKS TO LITIGATE IS NOT RIPE FOR REVIEW.

Rule 17 of the Supreme Court rules outline the factors governing consideration of certiorari petitions. None of them apply here. First, there is no split in the circuits. Both *Prill* v. *NLRB*, 755 F.2d 941 (CADC, 1985), and *Ewing* v. *NLRB*, —— F.2d ——, 119 LRRM 3273 (CA2, 1985), reached the identical result in this case. That result was that the rule the Board promulgated in its decision below was not mandated by the National Labor Relations Act and was without adequate rationale. (App. 46, 111) Moreover, there is no possibility of employers and employees having different obligations within different circuits, because the Board is continuing to adhere to the standard it articulated below pending the remand proceedings. See e.g., *Center Ridge Co.*, 276 NLRB #15 (1985).

Second, there is no conflict with any decision of this Court. To the extent that the Supreme Court has spoken to the issues raised here, it has supported the position of Prill. *NLRB* v. *City Disposal Systems, Inc.*, —— U.S. ——, 104 S. Ct. 1505 (1984;) *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978).

Finally, the court of appeals did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. It noted that the Board's opinion in this case "contains not a word of justification for its new standard in terms of the policies of the statute" (App. 83), and remanded to let the Board take another

crack at it. On September 27, 1985, the Board received statements of position from all the parties, including Meyers Industries itself,[1] and is presumably about to render a decision. That decision could come at any time, possibly even before this Court acts on the certiorari petition.

After the Board's decision on remand, in which it presumably will thoughtfully exercise its full measure of discretion and expertise, the parties will have another opportunity to bring the matter back for review in the circuit court. That is where review properly lies. Dissatisfied parties thereafter can then come here, when the issues would be ripe. This Court would then be able to make a more informed decision. The court of appeals has thus acted with the greatest caution and consideration for the Board's and Meyers' interests. Meyers' petition in No. 85-463 should be denied.

IV. CONCLUSION

If the Board had considered the issues of this case thoughtfully in the first instance, and if Meyers itself had been sufficiently interested to intervene in the court of appeals, there might be call for Supreme Court intervention. The time may yet come when this Court will have the chance to decide it. But that should await another day.

For these reasons, both petitions for writs of certiorari should be denied.

Respectfully submitted,

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[1] Meyers also moved before the Board to stay consideration until the instant petitions are disposed of. Prill is opposing that motion.